JAMES R BROWNING

IN THE

Supreme Court of the United States

No. 683

In the Matter
of
REGINALD LUSH,

Appellant,

vs.

COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK,

Respondent.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

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POINT I

The Supreme Court does have jurisdiction to entertain this appeal.

The November 5, 1959, order was not the final order of the New York State court on the issues presented, because those issues were raised again twice by the motion to appeal made to the Appellate Division, Third Department, and by

the further motion for leave to appeal to the Court of Appeals itself. This last motion was denied on April 21, 1960. The following were the issues which were timely raised in those motions for leave to appeal.

1. There is a question of law involved in that registration books were not properly prepared which resulted in a great deal of admitted confusion not only to the general public and the 59 people who actually came down to vote, but the registration clerks who selected and chose 11 out of 59 and permitted them to vote, but not the other 48, whose names were also in the registration books and were properly registered under the permanent registration law governing districts of less than 5,000. These 48 people definitely would have been more than the alleged plurality of 47 or majority of one.

2. There is a question of law as to whether voters can be compelled to register twice in one year (1956) without fair and reasonable warning from the School Board as to any procedural requirement for such alleged double registration, in view of the district being under 5,000 population and the registration books were prepared as they would be normally for such a small district.

3. There is a question of law involved as to whether a School Board can, in fact, misrepresent a taxing proposition to the public, relative to the cost of the building, the tax rates, the amount of State Aid, land site cost, and other important facts necessary for an informed public to properly judge a voting proposition, without any public hearings being held for the public to ascertain the truth.

4. There is a question of law involved as to whether the Commissioner can declare a fair election was held when one side was "frozen out" from having any inspectors of elec-

tion, registration clerks, or other election officials under Section 223 of the Election Law.

5. There is a question of law involved as to whether an election is valid when only one side is permitted to read the election results in violation of Section 261 of the Election Law.

6. There is a question of law as to whether the Commissioner can sustain an election when the votes on the voting machines are destroyed, in violation of specific sections of the law (Sections 261, 263 of the Election Law and Sections 2034, 2035 of the Education Law) prior to an appeal on the election being effectively presented.

7. The Commissioner ignored these statutory violations which permitted the election results to be wiped out in 28 days—against the express urging of the petitioner and his supporters in demanding that the Commissioner impound the machines (as is his duty).

8. There is a question of law involving the Commissioner's power to declare that a proposition had validly passed, in view of the admitted fact that the votes were destroyed in violation of the statutes.

9. There is a question of law as to whether the burden of affirmatively proving with a reasonable degree of certainty that the votes had been undisturbed and inviolate, rested with the Board of Education who seeks to sustain an election result, or as the Commissioner and Special Term state, that the burden and duty rests with the petitioner-appellant to impeach the votes which he never had a chance to see and count.

10. There is a question of law as to whether the voters truly have the right to decide a school taxing proposition or can the School Board and the Commissioner take any mani-

pulated results and accept them under their personal belief that it would be good educational policy.

11. There is a question of law as to whether the Commissioner has the right to refuse the production of public records when that power to produce lies with the Commissioner himself and the Petitioner so requests him to exercise it.

12. There is a question of law concerning the validity of the statutory provisions of the Education Law, Sections 310, 311, and the rules and regulations outlined by the Commissioner in his booklet, "The Laws and Rules of Practice", which allegedly permit the Commissioner to make oral procedural rules effectively blocking the petitioner from properly and adequately presenting all of the evidence that can be adduced; as an example, the failure to produce the registration books and the other documentary papers requested in our notice to produce which were in the exclusive custody of the School Board or the State Education Department.

13. There is a question of law as to whether a fair hearing was held when the Commissioner, at the so-called "oral" hearing, states that all he can deal with is a question of law and not of fact, in these words:

> "Dr. Brind: We have no witnesses here, and there can be no questions of credibility involved unless you have affidavits.
>
> "Dr. Allen: The only thing I can deal with is a question of law."

The above transcript, taken at the oral hearing held January 30, 1957; was made by the reporter who is now official reporter for the United States District Court for the Western District of New York.

14. There is a question of law involved with regard to the Commissioner foreclosing an adequate hearing when the

Commissioner's office has effectively arrived at an answer even dismissing the appeal before an oral hearing is held. It was admitted that prior to the oral hearing of January 30, 1957, responsible officials in the State Education Department had advised the Intervener-School Board to go ahead and sell the school bonds, because the appeal would be dismissed.

15. There is a question of law involved regarding the procedure of judicial review under Article 78 of the Civil Practice Act, in what court, and what forum, if any, may the petitioner-appellant properly secure the facts and conclusions of law that are necessary for an appellate tribunal to determine whether the Commissioner was "purely arbitrary".

And certifying that, in the opinion of the Court of Appeals, that questions of law are involved which ought to be reviewed by the Court of Appeals, together with such other and further relief as may be proper.

Rebuttal

The appellant herein had filed an application to reopen the entire proceedings on September 19, 1960. It took the Commissioner four months to reject this application on the ground:

> "I am unable to find that there is any material evidence not previously available which would change the decision or which could not have been utilized at the time of the original submission of this appeal."

This simply does not square with the facts which are partially admitted by the Commissioner himself as to making rules which effectively block the petitioner from presenting evidence. The problem can be more fully stated by an

elaboration of the question of the reopening of this appeal noted on page 8 of the respondent's brief.

The evidence submitted was proof from one of the leading members of the State Education Department itself that this taxing proposition to build a school under the existing Department's Master Plan would be subjected to conversion within five to ten years to an entirely different type of school —probably an elementary school. This would necessitate the floating of a second bond issue to permit its conversion. This is entirely different from using a building to add on additional facilities later. It means that the building's nature, character and purpose would be completely changed, contrary to an explicit statute, Volume VI New York Consolidated Laws, Service Local Finance Law, Section 11.

The appellant made every effort to make it available by his notice to produce (Exhibit 5 of the Record) and his prior demands to have testimony taken. However the Commissioner by his peculiar practice prevented appellant from producing this evidence which was exclusively within the Department's knowledge and which could not have been utilized by appellant because of the very act of the Education Department preventing the appellant from knowing anything about it.

It is submitted that it was a denial of due process for this taxpayer and the electorate in general to be deprived of the essential knowledge that the purpose of the taxing proposition was not as alleged, to build a completely integrated school system to be used for 30 years, but for perhaps about five to ten years and that the electorate, therefore, would have demanded that a more realistic, useful and needed building be built now.

Also, on September 19, 1960, the Commissioner's brief states that this appellant presented a petition to the

school board by "several persons." These "several persons" were 582 voters in this small district which would be the equivalent of approximately 3,000,000 people in New York City, demanding they wanted an opportunity to rectify a terrible mistake based on an election full of irregularities, misinformation and confusion.

These voters in this small isolated district are trying to prevent the foisting of a second-rate educational system upon them and their children (reluctantly admitted by the State Education Department) at a confiscatory cost.

It follows that taxpayers are being deprived of their constitutional rights when an administrator sanctions an election result when the votes were destroyed contrary to law.

CONCLUSION

It is respectfully urged that the appeal herein should be granted.

Respectfully submitted,

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